No. 80-869

IN THE

Supreme Court of the United States

October Term, 1980

DON HOTT, *Petitioner,*

-vs-

STATE OF INDIANA, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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No. 80-869

IN THE

Supreme Court of the United States

October Term, 1980

DON HOTT, *Petitioner*,

-vs-

STATE OF INDIANA, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

OPINION BELOW

The opinion of the Court of Appeals of Indiana on February 19, 1980, Number 2-878 A 297, is reported at 400 N.E.2d 206.

The order of the Supreme Court of the State of Indiana denying transfer, issued on September 4, 1980, with dissent by Justice DeBruler, is reported at 409 N.E.2d 1082.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), in order that this Court may review the decision rendered by the Indiana Court of

Appeals. Respondent believes that this Court should not assume jurisdiction by issuing the writ prayed for, since no real federal question of substance has been raised and since the construction of a valid statute of the State of Indiana is a matter properly left to the courts of this State.

QUESTION PRESENTED FOR REVIEW

Respondent would respectfully assert that the question presented to this Court is whether petitioner has raised a federal question of substance as to the construction by the Court of Appeals of Indiana of an Indiana statute concerning indecent telephone calls.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> §1. Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code §35-30-9-1, since repealed, provided:

> Whoever, by means of a telephone,
>
> (a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;
>
> (b) or makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, molest or harass any person at the called number;
>
> (c) or makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number;
>
> (d) or makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number;
>
> (e) or knowingly permits any telephone under his control to be used for any purpose prohibited by this section, shall be fined not more than five hundred dollars ($500) or imprisoned for any term not exceeding six (6) months, or both: Provided, That the use of a telephone facility shall include all use made of such facility between the points of origin and reception. Any offense committed under this section is a continuing offense and shall be deemed to have been committed at either the place of origin or the place of reception. [Acts 1961, ch. 249, §1, p. 576; 1971, P.L. 472, §1, p. 2122.]

STATEMENT OF THE CASE

On December 21, 1976, at about 11:00 p.m., petitioner Hott placed a telephone call to the home of the Huntington, Indiana, chief of police which awakened the chief from sleep. Hott identified himself and asked the chief to go and arrest Sergeant Ott, the duty sergeant, for a grievance. The chief responded that he did not wish to disturb his family, and Hott said: 'Fuck you. You talk to me if I want you to.' (Record at Trial, p. 56). The chief said he did not want to talk to Hott then but would be glad to do so in the morning, to which Hott replied: 'Fuck you, you no-good cocksucking son-of-a-bitch.' (Trial, p. 57). The chief hung up.

Minutes later, the prosecuting attorney for Huntington County, Indiana, who was asleep in his home, received a telephone call from petitioner Hott, who requested that an arrest warrant be issued for the chief of police. The prosecutor refused and Hott threatened to attack him. (Trial, p. 66). Again the prosecutor refused to issue a warrant, and the petitioner called the prosecutor a 'son-of-a-bitch.' (Trial, p. 66).

Both the chief of police (Trial, p. 62) and the prosecutor (Trial, p. 67) later testified they felt Hott's language was indecent. Hott admitted telephoning the two men that night. The petitioner was convicted on each of two counts for making annoying phone calls pursuant to Indiana Code 35-30-9-1(a) on March 8, 1978.

Hott appealed to the Indiana Court of Appeals, which affirmed his conviction on both counts on February 19, 1980. The opinion is appended hereto at page A-1. The Court held that since the statute contained a series of words written in the disjunctive, a separate meaning was implied for each word. Further, the Court held that petitioner's words were indecent in that they failed to conform to accepted standards of morality. Finally, the Court found the calls had invaded the privacy of the chief of police and of the prosecuting attorney and that the indecent language was not protected by the First Amendment to the Constitution of the United States.

Hott sought transfer to the Supreme Court of Indiana, which on September 4, 1980, denied his petition. (Appendix hereto, page A-5) Justice DeBruler dissented with opinion. It is to the Court of Appeals of Indiana that petitioner would have this Court issue a writ of certiorari.

ARGUMENT

I.

NO FEDERAL QUESTION IS RAISED AS TO THE CONSTRUCTION OF THE INDIANA STATUTE BY THE INDIANA COURT OF APPEALS.

Neither the interpretation by the Indiana Court of Appeals of the disjunctive terms employed in the statute, I.C. 35-30-9-1(a), nor the ruling by the Court of Appeals that the language used by the petitioner was indecent presents a substantial federal question which would require this Court to assume jurisdiction of this cause. In response to the petitioner's argument that all the terms used in that subsection, 'obscene, lewd, lascivious, filthy or indecent,' must be interpreted and defined to mean "obscene," the Court of Appeals cited the disjunctive "or" as implying a separate meaning for each word. This construction of the state statute, as the court noted, is in accord with the opinion of this Court in the case *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). There the F.C.C. finding that the broadcast of a monologue was, although not obscene, indecent under the proscription of 18 U.S.C. §1464 (1976) against broadcasting 'obscene, indecent, or profane' material was affirmed. This Court agreed with the F.C.C. that the language in the monologue was 'patently offensive,' 56 F.C.C.2d 94, 98 (1975); as to the construction of the statute, it held at 438 U.S. 739-740, that

> "[t]he plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality."

The Indiana Court of Appeals was guided by that opinion in its correct holding that the petitioner's language could be

ruled "indecent" without being "obscene". Thus, even if a federal question is presented as to that construction, the Court of Appeals correctly adjudged the matter in accord with the opinions of this Court, which in *Pacifica, supra,* clarified the question left by earlier cases dealing with similar statutes. Petitioner's argument that *Pacifica's* holding could apply only to administrative review proceedings is incorrect and presents no federal question since the Court of Appeals could properly apply its rule in Indiana in construing Indiana law. The term "indecent" cannot be defined differently as a function of the procedural context in which the matter arose. The opinion of the United States Court of Appeals for the Seventh Circuit as to the construction of the Indiana statute is not controlling since no state court construction of the law had then been rendered and since the *Pacifica* case, *supra,* had not yet been decided. *United States v. Simpson,* 561 F.2d 53 (7th Cir., 1977). Similarly, the other decisions put forth by the petitioner in support of his argument were either issued before *Pacifica* or were issued by the state courts of other jurisdictions. Since the Indiana Court of Appeals correctly decided the question of th construction of the disjunctive state statute, as a matter of state and federal law, the issue of whether Hott's language was "obscene" is irrelevant to this case. The language need only have been "indecent" to sustain the court's ruling.

Whether the petitioner's language was "indecent" is a matter of state court construction of state law. Since the Indiana Court of Appeals applied a standard accepted by this Court in defining what words are "indecent"—namely, whether they fail to conform with accepted standards of morality, *Pacifica, supra,* at 740—and accepted the trial judge's decision that the words were indecent, no federal question arises as to their offensiveness under state law to a person of ordinary intelligence in Huntington, Indiana. *Agins v. City of Tiburon,* 100 S.Ct. 2138 (1980). The chief of police and the prosecuting attorney felt the words were indecent; the trial court and the Indiana Court of Appeals

agreed, and this Court is bound by the state courts' construction of state law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), on remand 376 N.E.2d 582, 54 Ohio St.2d 286, 8 O.O.3d 265; *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), reh. den. 403 U.S. 924. This is particularly true where the state court correctly adjudged a federal right in holding that words found to be indecent or offensive are not always protected by the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *F.C.C. v. Pacifica Foundation*, *supra*, at 744.

In addition, no federal question is raised by the reference of the Indiana Court of Appeals to the right of the individual to privacy at home. The *Pacifica* case emphasized that privacy interest and said it "...plainly outweighs the First Amendment rights of an intruder," 438 U.S. at 748, since the fact that one could change a station—or here hang up the telephone—did not prevent or eliminate the offense already given by the indecent language. However, the Court of Appeals dealt only briefly with this issue since it had not been presented by the parties, and this Court should not accept jurisdiction based on an amorphous statement where the highest state court did not discuss the matter fully as an issue of either state or federal law. *Ellis v. Dixon*, 349 U.S. 458 (1955). No conflict has been presented with any decision by the Court. *See, Cohen v. California*, 403 U.S. 15, 21 (1971). No federal question of substance exists.

II.
THE STATUTE CONSTRUED BY THE INDIANA COURT OF APPEALS HAS BEEN REPEALED.

The Indiana statute under which the petitioner was tried and convicted has been repealed by Public Law 148, effective October 1, 1977, and has been replaced by Indiana Code §35-45-2-2, which has been amended since passage. The new law makes it a class B misdemeanor to make a

telephone call, whether or not conversation ensues, with intent to harass, annoy or alarm another person but with no intent to have legitimate communication. The terms "obscene, lewd, lascivious, filthy or indecent" have been removed from Indiana's statute. Therefore the matter presented by the instant case is no longer a live an actual conflict and is not likely to recur; this Court should not accept jurisdiction. *Cook v. Hudson*, 429 U.S. 165 (1976); *Sanks v. Georgia*, 401 U.S. 144 (1971).

Petitioner cites the dissenting opinion of Justice DeBruler on the denial of transfer by the Indiana Supreme Court, apparently in an attempt to convince this Court that his language was not "indecent," *i.e.* in nonconformance with accepted standards of morality. However, he acknowledges that the recipients of the telephone calls termed the words "indecent" and does not attempt to dispute the inference that the language was offensive. While the words used by petitioner may not have been obscene, lewd, or lascivious, they were indecent to those who heard them and justified conviction as a matter of state law in effect at the time. Since that ruling was within the bounds of decisions by this Court, and since the state courts dealt with a state statute which has been repealed, it is unlikely that the issue will again be presented and no federal question compels review by certiorari. *Hall v. Beals*, 396 U.S. 45 (1969). The Indiana Court of Appeals ruling accepting the trier of fact's findings as to the statements by petitioner and construing as a matter of state law the term "indecent" should not be reviewed. *Herb v. Pitcairn*, 323 U.S. 117 (1945).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

DECISION OF THE COURT OF APPEALS
OF INDIANA FIRST DISTRICT

DON HOTT,	)	
	)	
Defendant-Appellant,	)	
	)	
-v-	)	NO. 2-878 A 297
	)	
STATE OF INDIANA,	)	
	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE HUNTINGTON COUNTY COURT
The Honorable Gale Jones, Judge

NEAL, J.

This is an appeal by defendant-appellant Don Hott from the Huntington County Court from a conviction of making an indecent telephone call.

We affirm.

On December 21, 1976, defendant, at 11:00 p.m., made a telephone call to the chief of police of Huntington, which call awakened the chief from his slumber. Defendant, in an irritated and aggravated way, requested the chief to go and arrest the duty sergeant for some grievance. The chief refused, and thereupon defendant called him names in vile gutter language, impugning canine ancestry with tendencies *en fellatio*, the exactitude of which is unnecessary for this opinion. Minutes later defendant called the prosecuting attorney at his home, also awakening him from his sleep. This conversation was similar to the one with the chief, but here, the words used simply impugned canine ancestry.

The defendant was charged in two counts, one for each telephone call, with committing offenses under IND. CODE 35-30-9-1(a), since repealed, which provides, in part, as follows:

> *"Whoever, by means of a telephone, (a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;*
>
> * * *
>
> *shall be fined not more than five hundred dollars ($500) or imprisoned for any term not exceeding six (6) months, or both..." (Emphasis added.)*

In a trial before the court the defendant was convicted on both counts.

The questions presented for review are constitutional arguments involving the definition of "obscene, lewd, lascivious, filthy *or* indecent" language, and whether the conduct is protected under the free speech provisions of the First Amendment to the United States Constitution.

Defendant argues that when a series of words begins with a particularly defined word, all of those words which follow are included in the definition of the original word, and that under this basic rule, the terms "lewd, lascivious, filthy or indecent" are combined into the word "obscene" in the statute under consideration. Defendant proceeds from that point to develop his argument by citing the case of *United States v. Simpson*, 561 Fed. 2d 53 (7th Cir. 1977). There the court held that the terms indecent, filthy, vile, obscene, lewd, and lascivious, all have common meaning, that is obscene. Defendant further advances his argument by noting that *Simpson* holds that obscene refers to matters of sex and connotes prurient appeal.

Defendant cites *Roth v. United States*, (1957) 354 U.S. 476, 489, as the standard to determine obscenity, that test being "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

In summary, defendant argues that there was nothing in the evidence to show defendant's conduct was erotic in nature, and it did not sexually arouse the prosecuting attorney or the chief, nor did it appeal to the prurient interest, and therefore it was not obscene.

Authority exists as to examples of conduct that were determined by the Supreme Court not to be obscene within this definition. In *Cohen v. California*, (1971) 403 U.S. 15, wearing a jacket with a vulgar expression opposing the draft in the corridors of a courthouse was not obscene. In *Hess v. Indiana*, (1973) 414 U.S. 105, vulgar language in a group in an anti-war rally was not obscene. In *Simpson, supra*, a broadcast on a C.B. radio with explicit reference to sexual activities, sexual organs, and abusive epithets directed at other ham operators was not obscene.

The case of *Federal Communications Commission v. Pacifica Foundation*, (1978) 438 U.S. 726, alters the authorities cited by defendant. In that case the defendant broadcast a satiric monologue of "filthy words." The F.C.C. statute contains proscriptions against the broadcast of "obscene, indecent, *or* profane" material.[1] Pacifica Foundation's claim that the broadcast was not indecent within the meaning of the statute was based entirely upon the absence of prurient appeal. The court noted that the terms were written in the disjunctive, implying that each has a separate meaning. It held that prurient appeal is an element of the obscene but the normal definition of indecent merely refers to nonconformance with accepted standards of morality. Therefore, the language used in this broadcast was indecent within the meaning of the statute.

The *Pacifica Foundation* court, citing *Cohen, supra*, in its comments, made a further distinction that whether a communication is protected under the First Amendment depends also upon where and how it is made. It noted that governmental entities may constitutionally act to prohibit

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[1]18 U.S.C. §1464 (1976).

unwanted intrusions into the privacy of the home of unwelcome views and ideas, which include harrassing telephone calls, and the use of obscene or profane language on the telephone, the natural consequence of which is to abuse the hearer. Such conduct, while it may be protected elsewhere, will not be protected where there is a showing that substantial privacy interests are being invaded.

We observe that IND. CODE 35-30-9-1(a) contains the words "obscene, lewd, lascivious, filthy *or* indecent" (emphasis added) in the disjunctive, which, according to the authority of *Pacifica Foundation, supra,* implies a separate meaning to each. The word "indecent" refers to nonconformance with accepted standards of morality. We hold that the words used by the defendant in the telephone conversation were indecent within that definition. We further hold that the defendant's conduct in calling the chief of police and the prosecuting attorney at their homes at 11:00 p.m. while they were in bed and in using indecent language was an invasion of a substantial interest in privacy, and was not otherwise protected by the First Amendment.

For the above reasons, this cause is affirmed.

Affirmed.

ROBERTSON, P.J. and RATLIFF, J. CONCUR.

RULING OF THE INDIANA SUPREME COURT

"You are hereby notified that the Supreme Court has on this day denied Appellant's Petition to Transfer without opinion. Givan, C.J. DeBruler, J., votes to grant transfer with opinion."

DISSENT OF JUSTICE DeBRULER

Appellant was charged and convicted of making two obscene telephone calls in violation of Ind. Code §35-30-9-1(a) (repealed effective January 1, 1978). He received concurrent sentences of 180 days on the State Farm and a $500 fine on two counts.

The evidence given by the Chief of Police of Huntington, Indiana showed that he received a phone call late at night after he had retired. Appellant identified himself as the caller and complained about some things he had heard that the local police were saying about him. He said that he had called a Sgt. Ott who would not listen to him and had hung up on him. Appellant was angry and cursed during the conversation and when the Chief told him he did not want to listen anymore, the appellant said "Fuck you, you no-good cock-sucking son-of-a-bitch." Appellant then made the second phone call to the prosecutor of Huntington County, threatened him and in the course of the conversation called him a son-of-a-bitch.

Indiana Code §35-30-9-1(a) and (b) provide:

> "Whoever, by means of a telephone,
> (a) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;
> (b) or makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, molest or harass any person at the called number...."

The charges against appellant were brought pursuant to Ind. Code §35-30-9-1, subsection (a). The Court of Appeals affirmed the convictions at 400 N.E. 2d 206, and in so doing

held that appellant's language was indecent within the meaning of that term in the statute. The meaning given this term by that court is erroneous. We deal here with interpreting and applying a criminal statute. In reading it one cannot escape the realization that the perimeters of the proscription in the terms "obscene, lewd, lascivious, filthy or indecent" are obscure and caution is dictated. We are bound to interpret statutes having ambiguities of this sort so as to resolve such doubts in favor of the accused. *Adamo Wrecking Co. v. United States*, (1978) 98 S.Ct. 566; *Utley v. State*, (1972) 258 Ind. 443, 281 N.E. 2d 888; *Hutcherson v. State*, (1978) ____Ind. App.____, 382 N.E. 2d 983. The presence of doubt here cannot be rationally questioned. Angry cursing and vilification cannot properly be characterized as a "comment, request, suggestion or proposal." It surely is not a request, suggestion or proposal. If considered a comment, upon what was it a comment? Appellant's calls were none of those things. They were abusive attacks upon the two men by word. Their purpose was to revile. One simply cannot be comfortable in referring to them as indecent comments.

Upon reading subsection (a) it is at first apparent that the five terms, obscene, lewd, lascivious, filthy and indecent, are synonyms. When considered in this string, each term, including indecent, connotes a common meaning, and it is that meaning which the Legislature sought to refer to in inserting them in the statute. Each term refers to matters of sex and connotes prurient appeal, or to put it in the manner urged by appellant, each of these terms are used in the statute can properly be considered within the legal meaning of the term obscene. Interpreted in this manner, it follows of necessity that appellant's conviction cannot stand since the manner in which appellant employed these vulgar epithets was not intended to, and, in fact, did not appeal to prurient interests and therefore could not be obscene. *Cohen v. California*, (1971) 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 284; *Hess v. Indiana*, (1973) 414 U.S. 105 94 S.Ct.

326, 38 L.Ed. 2d 303. This interpretation of our statute is firmly supported by persuasive authority.

In *Hamling v. United States*, (1974) 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590, the Supreme Court considered the statutory string of terms, "obscene, lewd, lascivious, indecent, filthy or vile" and concluded that the term indecent there had the same meaning as "obscene". In *FCC v. Pacifica Foundation*, (1978) 98 S.Ct. 3026, relied upon by the Court of Appeals in affirming appellant's conviction, the Supreme Court considered by contrast a string of terms, "obscene, indecent or profane", and concluded that prurient appeal was not an essential component within the term indecent, and therefore in that context "—obscene" and "indecent" were not equivalent terms. The court in *FCC* did not deem itself bound by *Hamling*, because *Hamling* dealt with printed matter enclosed in sealed envelopes and mailed from one person to another while the statute in *FCC* dealt with public broadcasts. Neither of these cases is, of course, binding on this Court in making a legal interpretation of an Indiana statute. Since a private telephone conversation is more like a private written communication than it is like a public broadcast for these purposes, it is highly likely that the Supreme Court would deem itself bound by *Hamling* in interpreting an act of Congress using the language of the Indiana statute under consideration, and would find that "obscene" and "indecent" are equivalent terms having an appeal to the prurient interest as an essential element, and would reverse appellant's conviction.

To construe this Indiana statute to require proof of an appeal to prurient interest is further reinforced when subsection (a) is considered along with subsection (b). Subsection (b) prohibits telephone calls which are made with the intent to "annoy, abuse, threaten, molest or harass any person at the called number." The statute itself this distinguishes between indecent calls on the one hand and abusive, harassing and threatening calls on the other. Telephone calls made to women for sexual stimulation or

gratification or to persons of both sexes to intimidate could hardly escape the categories in subsection (b). The distinction made would indicate that the term "indecent" has a narrow and special meaning. I cannot, therefore, agree with the Court of Appeals that the term "indecent" was intended in its broadest sense as referring to "nonconformance with accepted standards of morality."

Appellant's calls to the Chief and the Prosecutor did not constitute violations of the statutory provision pursuant to which the charges were brought, and his convictions should be reversed.